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No. 656

SUPREME COURT

of the

UNITED STATES

October Term 1947

EDWARD J. BLOOM AND HELEN BLOOM,

Petitioners.

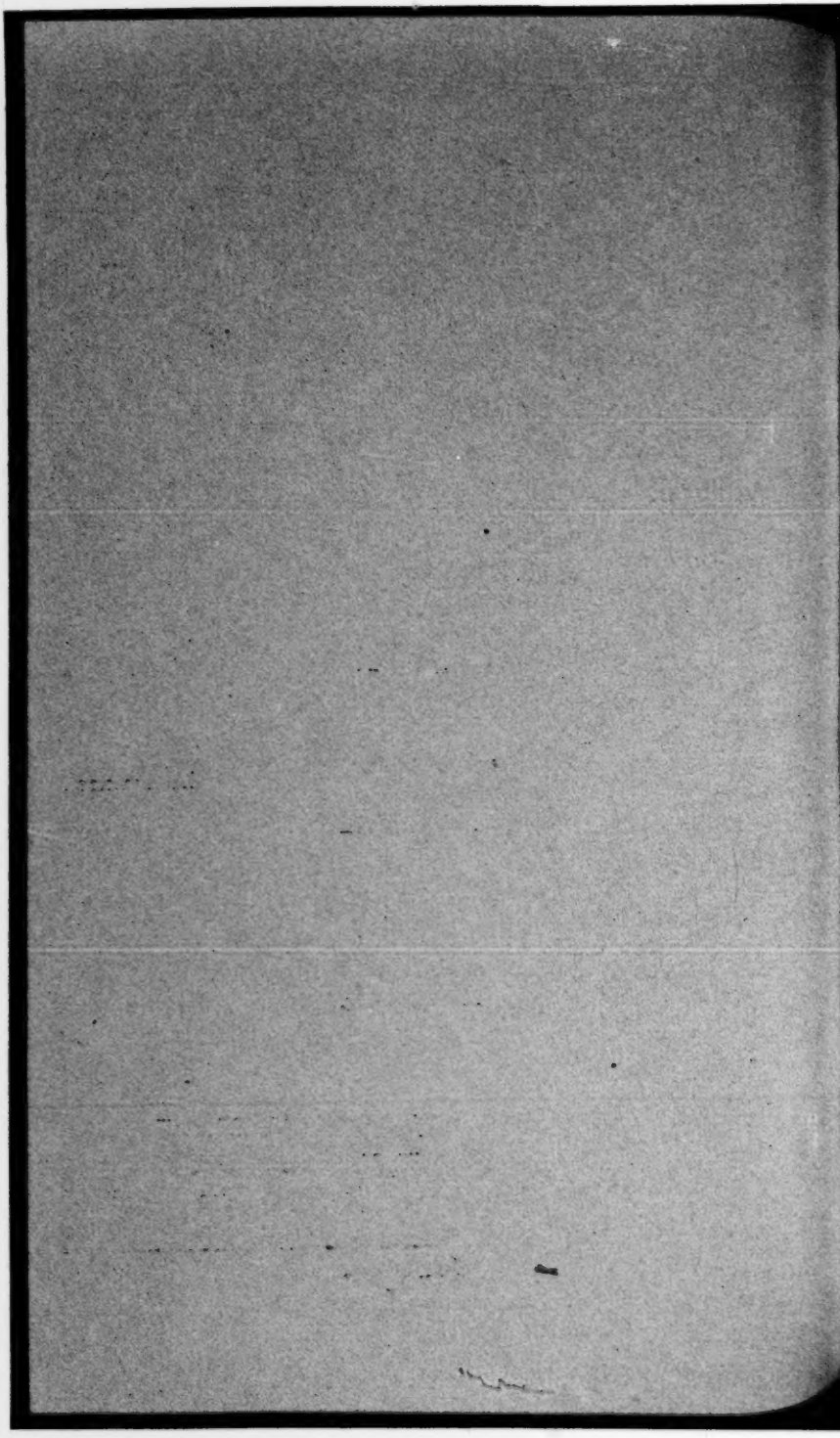
—vs.—

GEORGE F. RYAN,

Respondent.

RESPONDENTS BRIEF ON PETITION FOR WRIT OF CERTIORARI

WALTER L. POPE
RUSSELL E. SMITH
Missoula, Montana,
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OFFICIAL REPORTS

The decisions of the District Courts of the State of Montana are not officially reported. The Findings of Fact and Conclusions of Law and Judgment of the District Court appear at pages 27-32 of the printed record.

The decision of the Supreme Court of the State of Montana has not as yet been officially reported. The opinion appears at page 150 of the printed record and is unofficially reported in 186 Pac. (2d) 879.

STATEMENT OF JURISDICTION

Jurisdiction is claimed to arise out of the Soldiers and Sailors Civil Relief Act, (Public Law, 76th Congress, 56 Stat. 1178, 50 U.S.C.A. App., Sections 501-548.)

STATEMENT OF CASE

Respondent brought an action to quiet title to lands in Granite County, Montana, naming petitioners and others as defendants. Trial was had in the District Court of Granite County, resulting in a judgment for respondent. This judgment was affirmed on appeal.

The facts are as follows: In November, 1941, petitioner, a self-styled specialist in mining contracts (R. 129) procured from respondent, then a man of about 70 years of age (R. 43) two papers. One was a quit claim deed (Ex. 5, R. 46) and the other an agreement (Ex. 4, R. 44). These two instruments were made at the same time and as a part of the same transaction and as a matter of local law are to be construed together. (Dist. Ct., Conclusion of Law No. 1, R. 31; Supreme Court, R. 156).

The deed was delivered on condition that it be not recorded until the payments called for by the agreement had been made. (Dist. Ct. Finding of Fact No. VIII(R. 30; Supreme Ct. R. 155). The entire transaction amounted to an option under the Montana law. (Supreme Ct. R. 157).

No consideration was paid to the respondent at the time the documents were executed. (Dist. Ct. Finding of Fact. No. VII, R. 30), and petitioner did not bind himself to make any payments except $10.00.

The option called for performance by petitioner of the following: (Ex. 4, R. 44).

1. Payments of $25.00 per month until January, 1944.
2. Payments of $1200.00 per year after January, 1944.
3. Payment of taxes.
4. Fixing a bridge.

Petitioner on September 10, 1945, tendered $150.00 which was refused, and without the knowledge of respondent, paid the taxes for 1945 and 1946. These tax payments were made after petitioner left the military service. (R. 101 and 100). Otherwise he did nothing. (Dist. Ct. Finding of Fact No. IX, R. 30.)

Petitioner entered the military service on February 28, 1942, and he left it on June 30, 1945. (R. 101.) At the time of his entry in the military service he was in default under the terms of the option, having failed to pay the $25.00 due in December 25, 1941 and January and February 25, 1942. (Sup. Ct. R. 158).

ARGUMENT

The only provision of the Solders' and Sailors' Civil Relief Act which could possibly have any application and the only one cited by petitioners is Section 531 Title 50 U.S.C.A.

That section provides:

> "(1) No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease, or bailment, from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due or for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction. (2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) of this section or in section 107 [section 517 of this Appendix], or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.
>
> (3) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act

unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties. Oct. 17, 1940, c. 888, § 301, 54 Stat. 1181, as amended Oct. 6, 1942, c. 581, § 9 (a, c, d), 56 Stat. 771."

As to this section the findings of the lower court were:

"That the defendant Bloom's service in the United States Navy brought him within the provisions of the Soldiers' and Sailors' Civil Relief Act. That the provisions of that act under the facts of this case do not constitute a defense to this action." (R. 36.)

The Montana Supreme Court held:

"No. 6. Appellants contend that the soldiers' and sailors' civil relief Act constitutes a defense to this action, in view of the fact that defendant Edward J. Bloom served in the United States Navy during World War II. Defendants have not cited any specific provision of said Act in support of their contention but have left to this court the task of ascertaining what provision if any of said Act is claimed to be applicable to the facts of this case. We have examined the soldiers' and sailors' civil relief Act (U.S.C.A., Title 50, Secs. 501-590) and we find no provisions of said Act which might be claimed to be applicable to this case unless it be the provisions of subdivision 1 of section 531 (Title 50, U.S.C.A.) as amended by the Act of 1942 relating to relief under rental agreements, installment contracts, mortgages, etc. That section however, insofar as the facts of this case are concerned, provides relief for those in the military service who have paid a deposit or installment payment under a contract for the purchase of real estate. Assuming for present purposes that Edward J. Bloom's contract was one for the purchase of land, it is plainly ap-

> parent that he never paid any of the installments due on said contract and that he is not therefore within any of the classes of persons enumerated in section 531, supra." (R. 216.)

Upon analysis, it is clear that Section 531 cannot be applicable to the situation presented by this record. Subsection 1 simply makes it unlawful to forfeit a contract or resume possession of property except through a court of competent jurisdiction. Subsection 2 makes such a forfeiture or resumption of possession a misdemeanor while subsection 3 provides what may be done by a court where an action to rescind or otherwise terminate a contract has been commenced.

The prohibitions of subsection 1 apply only to those who have received a deposit or installment on the purchase price from persons who, after the date of payment, have entered the military service. In this case, the respondent received no payment or deposit prior to the time that petitioner entered the military service, nor, as a matter of fact, at any time thereafter. Consequently, by its very language subsection 1 does not apply. Further, it is clear that subsection 1 applies only to those cases in which a party to an installment contract seeks to exercise some right of forfeiture given by the contract. In this case the respondent did not seek to forfeit a contract. He simply sought to clear his record title of a cloud created by petitioner's unlawful recording of the deed. The lower court, having characterized the whole transaction as an option, properly determined that upon the failure to pay the amounts due when they became due under the option, that the same

terminated without action on the part of the respondent. Since petitioner was in default at the time he entered the service and since at that time he had no right to make further payments under the contract or to exercise any rights to the land involved, it follows that the Soldiers' and Sailors' Civil Relief Act cannot come to his rescue now and breathe life into an option which had expired prior to the date of petitioner's military service.

Even if Section 531 were otherwise applicable it would provide no comfort to petitioner. The only effect of the section is to invest the trial courts with a discretion as to the relief which may be granted. Only for an abuse of discretion could an appellate court interfere. The trial court in this case could not have required the respondent to return any installments of the purchase price since he had received none. Nor could the trial court be held to have abused its discretion in not requiring the respondent to receive the purchase price which was tendered for the first time at the trial.

The first default under the option rendered the option unenforceable. That occurred prior to petitioner's military service. It could not have been determined as a matter of discretion or otherwise that the default which terminated petitioners' rights had any relationship to his military service. Under subsection 3 of Section 531 the discretion of the court is called into play only when the defendant's ability to pay is affected by his military service.

The cases cited on this proposition by petitioner do not warrant serious consideration. *Bassham* vs. *Evans* (Tex.)

216 SW. 446, involved the foreclosure of a vendor's lien. In that case the assignor of the party in military service had paid $275.00 down and the person in military service had paid $300.00 to his assignor. Even so, the court held that Section 531 was not applicable.

The cases of *Nassau S. & L. Assn.* vs. *Ormond,* 39 N.Y.S. (2d) 92, *Stability B & L Assn.* vs. *Liebowitz,* (N.J.) 28 Atl. (2d) 653, *Twitchell* vs. *Home Owners' Loan Corporation,* (Ariz.) 122 Pac. (2d) 210, and *Brown Service Insurance Co.* vs. *King* (Ala.) 24 So. (2d) 218, all involved mortgage foreclosure proceedings and the application of Section 532 to them.

Lesher vs. *Louisville G. & E. Co.,* 49 F. Supp. 88, was an action against a utility which had shut off service for non-payment of charges. The court held the Act not to be applicable, saying that the courts had no power under the guice of liberal construction to judicially legislate.

The case of *Gilluly* vs. *Hawkins,* (Wash.) 182 Pac. 958, is a case in which the provisions of section 530 relative to eviction for non-payment of rent were involved, and the court held that the trial court did not abuse its discretion in refusing a stay upon the final hearing of an action in unlawful detainer.

In Re Cool's Estate (N. J.) 18 Atl. (2d) 714, was a case in which the court held that the provisions of Section 520 relating to default judgments were applicable to a probate proceeding.

In the case of *Oliver* vs. *Oliver* (Ala.) 12 So. (2d) 852, the court considered the sufficiency of an affidavit of non-

military service under the provisions of Section 520 relative to default judgments.

The case of *UNI Credit Corp.* vs. *Ganter,* 44 NYS (2d) 908, involved a conditional sales contract of the usual type on which payments had been made.

The foregoing authorities bear not the slightest resemblance to this case. Some of them do hold that the Act should be liberally construed. Under the guise of liberal construction the court is not warranted in placing under the protection of the Act persons to whom the Act itself gives no protection. In the case of *Ebert* vs. *Poston,* 266 U. S. 548, the Supreme Court of the United States, in reversing a judgment of the Supreme Court of Michigan held that the Act could be applied only to those persons and situations mentioned in it. The court said that "A casus omissus does not justify judicial legislation," and further "such care and particularity in treatment preclude expansion of the act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions."

Respectfully submitted

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